No. 4040

United States Circuit Court of Appeals
For the Ninth District

T. M. CALDWELL,

Appellant,

vs.

ALBERT STEINFELD, BETTINA STEINFELD, FIDELITY & SAVINGS & LOAN ASSOCIATION, a Corporation, and PIMA FARMS COMPANY, a Corporation, et al.,

Appellees.

BRIEF FOR APPELLEES

SAMUEL L. KINGAN,
JOHN H. CAMPBELL,
ARCHIE R. CONNER,
Solicitors for Appellees.

Filed this ..... day of October, 1923.

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Clerk of the United States Circuit Court of Appeals, Ninth Circuit.

Kingan, Campbell & Conner,
46 North Church Street,
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BRIEF AND ARGUMENT

The plaintiff in the above entitled case claims a lien on certain canals, water ditches and land by virtue of the furnishing of mules and equipment under a written contract between the plaintiff and Edwin Post.

THE STATUTE WHICH GOVERNS APPELLANT'S CLAIM OF LIEN

That section of the Revised Statutes of Arizona, 1913, Civil Code, allowing a lien for the construction,

etc., of any canal, water ditch, etc., reads as follows:

> "Paragraph 3653: All persons who may labor or furnish material of any kind in the construction, alteration or repair of any canal, water ditch, flume or aqueduct or reservoir, bridge, fence or other structure or improvement, and to whom money or wages are due or owing therefor, shall hereafter have a lien upon the same for such sums as are unpaid."

Counsel for appellant contend that paragraph 3639 is the paragraph of the Arizona statutes governing appellant's right to a lien. They set out this paragraph at page 8 of their brief, and for the sake of brevity we will not repeat it here.

In March, 1885, the Legislature of the Territory of Arizona, passed an Act, No. 93, securing liens to mechanics, laborers, and others, which is to be found on page 240 of the Laws of the Territory of Arizona, Thirteenth Legislative Assembly. Said act provided that (in section 1)

> "Every person performing labor upon or furnishing material of the value of $25 or more, to be used in the construction, alteration or repair of any building or other superstruction, railroad, tramway, toll-road, canal, water-ditch, flume, aqueduct or reservoir, building, bridge, fence or any structure or improvement, except property exempt

by law from execution, has a lien upon the same for the work or labor done or material furnished", etc.

Section 1 also provided for a lien for miners. Separate sections gave liens for any person who filled in any lot in an incorporated city or town; any artisan or mechanic who makes, alters or repairs any personal property; any person who performs labor or work on any tract of land by cutting and cording the timber thereon, and to all foundry men and boiler makers for performing work upon machinery, etc.

Under authority of an act of the legislative assembly the governor appointed a commission to revise the laws of the territory. Such commissioners were directed by statute to eliminate "all crude, useless, imperfect and contradictory matter, and insert such new provisions as they might deem necessary and proper."

Accordingly in the Revised Statutes of Arizona, 1887, we find a complete revision of the lien laws relating to mechanics, laborers and others. Par. 2258 of the laws of 1887 is as follows:

"That any person or firm, lumber dealer, artisan or mechanic, who may labor or furnish material, machinery, fixtures or tools to erect any house or improvement, or to alter or repair any building or improvement whatever, shall have a lien on such house, building, fixtures or improvements, and

shall also have a lien on the lot or lots of land necessarily connected therewith, to secure payment for labor done, lumber, material, machinery or fixtures and tools furnished for construction, alteration or repairs."

Par. 2274 related to liens of mechanics, laborers, etc., on railroads; par. 2276 related to liens of miners and laborers upon mines and mining claims; par. 2277 related to liens upon lots in any incorporated city, etc.; par. 2278 related to liens of foundrymen, boiler makers, etc.; par. 2279 related to liens for all persons who cut or cord wood. Par. 2275 reads as follows:

"All persons who may labor or furnish material of any kind in the construction, alteration or repair of any canal, water-ditch, flume or aqueduct or reservoir, bridge, fence or other structure or improvement, and to whom money or wages are due, or owing therefor, shall hereafter have a lien upon the same for such sums as are unpaid."

This paragraph is in the same language and is identical with the language of par. 3653 of the R. S. of 1913, as will be shown from a comparison with par. 3653 heretofore set out.

The next revision of the statutes occurred in 1901 and in the Revised Statutes of that year we find the same arrangement as in the code of 1887. Par. 2258, above set out, appeared in the 1901 statutes as par.

2888 and the only change in said paragraph was in the first line. "That any person, or firm, lumber dealer, artisan or mechanic, who may labor" was changed to read, in the 1901 statutes, to "That any person, firm or corporation who may labor".

Par. 2275 relating to canals, water-ditches, etc., set out above, appeared without the slightest change in the 1901 statutes as par. 2903. The various lien paragraphs mentioned above also appeared in the 1901 statutes as separate paragraphs; none of them were discarded but all appeared in the 1901 statutes.

The next and last revision of the statutes occurred in 1913. In the 1913 statutes we find the paragraph relating to liens on canals, water ditches, etc., appearing as paragraph 3653, and in the same language as it appeared in the codes of 1887 and 1901. The various lien paragraphs mentioned as appearing in the codes of 1887 and 1901 also appeared in the 1913 statutes, as separate paragraphs. The lien paragraphs relating to the lien upon any lot in an incorporated city or town, for every person who furnishes material or labors or fills in or otherwise improves the same; the lien of foundrymen, boiler makers, etc.; the lien in favor of all persons who cut or cord wood, skid logs or pile ties, etc.; and the lien in favor of all persons who may labor or furnish material in the construction, etc., of any canal, water ditch, etc., were all unchanged and the same as they appeared in the code of 1901. The paragraph relating to railroads was the same as it ap-

peared in the statutes of 1901, with the exception that it had a paragraph added thereto.

Par. 2888 of 1901 was slightly amplified and changed by the Code Commissioners and appeared in the 1913 statutes as par. 3639 (being the paragraph which counsel for appellant contend is governing as to appellant's right to a lien), but it was not materially changed and it was not intended to and did not take the place of par. 3653. That such was the case is shown in the fact that the Code Commissioners placed just beneath par. 3639, in the 1913 statutes, as a construction thereof, a citation to the case of *Gates v. Fredericks,* 5 Ariz. 343, 52 Pac. 1118, which was a decision by the Supreme Court of Arizona on par. 2258 of the R. S. of 1887, and by the fact that the language of par. 3639 was not enlarged to incorporate into it or to cover the matters and things contained in par. 3653 and by the fact that par. 3653 was included by the Code Commissioners in the R. S. of Arizona, 1913, and reenacted by the Legislature.

Paragraphs 3653 and 3639 were adopted by the legislature at the same time. In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law. In construing acts passed at the same session of the legislature, it is to be presumed that such acts are imbued with the same spirit and actuated by the same

policy and they should be so construed as to harmonize and force and effect should be given to the provisions of each. The legal presumption is that the legislature did not intend to enact contradictory statutes and the statutes should be construed so that both may stand, if possible. These two paragraphs of the Arizona statutes under consideration were enacted at the same time and have remained together as a part of the statutes of Arizona since 1887. Since that time the statutes have been re-enacted twice and each time the two paragraphs under consideration have been re-enacted. The separate lien paragraphs relating to mines, lots, foundrymen, wood cutters, etc., have also been re-enacted during the same period of time, showing clearly the intention of the legislature to retain, as a part of the law, the separate lien paragraphs.

Par. 3639 uses a general term "structure" while par. 3653 refers specifically to "canals, water-ditches, aqueducts, reservoirs," etc. In *United States v. Chase,* 135 U. S. 260, 34 L. Ed. 117, 119, 10 Sup. Ct. Rep. 757, the following rule is stated:

> "It is an old and familiar rule that, 'where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within the general language as are

not within the provisions of the particular enactment.' * * This rule applies wherever an act contains general provisions and also special ones upon the same subject, which, standing alone, the general provisions would include. Endlich on Interpretation of Statutes, 560."

In order to show how little change was made in par. 2888 of the R. S. of 1901, when it appeared in R. S. of Arizona, 1913, as par. 3639, we will set out par. 2888 of the R. S. of 1901 in full:

"2888. (Sec. 9.) That any person, firm or corporation who may labor or furnish material, machinery, fixtures, or tools to erect any house or improvement, or to alter or repair any building or improvement whatever, shall have a lien on such house, building, fixtures or improvements, and shall also have a lien on the lot or lots or land necessarily connected therewith, to secure payment for labor done, lumber, material, machinery or fixtures and tools furnished for construction, alteration or repairs."

Par. 3639, set forth in appellant's brief at page 8, is as follows:

"Every person, firm or corporation who may labor or furnish materials, machinery, fixtures or tools to be used in the construction, alteration,

erection, repair or completion of any building or other structure or improvement whatever shall have a lien on such house, building, structure or improvements for the work or labor done or materials, machinery, fixtures or tools furnished," etc.

Par. 2888 says "shall have a lien on such house, building, fixtures or improvements" while par. 3639 says "shall have a lien on such house, builidng, structure or improvements", there being only a change of one word in the phrase conferring the lien, the change being from the word "fixtures" to that of "structure". It cannot be argued that by changing "fixtures" to "structure" the Code Commissioners and the legislature intended to repeal par. 3653, and to include in par. 3639, "canal, water-ditch, flume or aqueduct or reservoir, bridge, fence" as set out in par. 3653. Had they desired to include those things set forth in par. 3653 in par. 3639 it seems reasonable to suppose that they would have used language indicating their intention, and not just the word "structure", and would not have retained 3653 as a part of the law.

As par. 3653 has never been expressly repealed, it therefore follows that unless it was impliedly repealed by changing the word "fixtures" to "structure" in par. 3639, it is still in full force and effect. On page 1074 of vol. 36 Cyc, the following appears:

"Between the two acts there must be plain, un-

avoidable, and irreconcilable repugnancy, and even then the old law is repealed only pro tanto, to the extent of the repugnancy. If both acts can, by any reasonable construction, be construed together, both will be sustained."

Par. 3653 relates specifically to canals, water ditches, flumes, aqueducts, reservoirs, etc., and is not in any way inconsistent with or repugnant to par. 3639.

36 Cyc, page 1071, states the following:

"The repeal of statutes by implication is not favored by the courts. The presumption is always against the intention to repeal where express terms are not used. To justify the presumption of an intention to repeal one statute by another, either the two statutes must be irreconcilable, or the intent to effect a repeal must be otherwise clearly expressed. It follows that where the intention not to repeal is apparent or manifest from an act there is no room for repeal by implication, or the application of rules regarding implied repeal."

In 25 Ruling Case Law, page 918, the following appears:

"Repeals by implication are not favored, and will not be indulged if there is any other reasonable construction. The presumption is always against the intention to repeal where express terms

are not used and the implication, in order to be operative, must be necessary."

It is very clear that both paragraphs under consideration are co-existing and do not in any way conflict. As both paragraphs were passed at the same time, it cannot be urged that either paragraph repealed the other. Therefore the lien claimed can only exist, if it exist at all, under and by virtue of par. 3653 of the R. S. of 1913.

Counsel for appellant cite the case of *Mendoza, et al., vs. Central Forest Co.*, 174 Pac. 359, on page 9 of their brief, as showing that an irrigation system is a structure within the meaning of the word as used in par. 3639 of the Arizona statutes. From the few lines quoted by counsel for appellant this might seem to be the case, but upon reading the entire case and the statute under which the lien was claimed, it is apparent that the short quotation by counsel for appellant is misleading. The action in the Mendoza case was under section 1183 of the Code of Civil Procedure of California, which is as follows:

"Mechanics, materialmen, contractors, subcontractors, artisans, architects, machinists, builders, miners, teamsters and draymen, and all persons and laborers of every class performing labor upon, or bestowing skill or other necessary services, or furnishing materials to be used or consumed in or

furnishing appliances, teams and power contributing to the construction, alteration, addition to or repair, either in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, wagon road or other structure, shall have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done and materials furnished and for the value of the use of such appliances, teams or power," etc.

The above quotation was taken from the Mendoza case and was in full force and effect at the time such decision was rendered.

In the Mendoza case we find the following:

"In Williams v. Mountaineer Gold Mining Co., 102 Cal. 134, 34 Pac. 702, 36 Pac. 388, Mr. Justice Temple, speaking for the court, construed these terms as follows:

'The use of the phrase 'other structure' in the above extract (from section 1183) shows that the word 'structure' comprehends all the properties specifically enumerated, and is broad enough to include any *similar* thing constructed, should the enumeration prove incomplete'.

* * * * * * * *

"In the present case, we think, the definition

given by Judge Temple, supra, will lead us to our destination."

The action in the Mendoza case was brought to obtain a lien for farm development, consisting of ditches, drains, etc., some of which, as ditches and roads, were expressly designated as structures in the statute. The others were *similar* things to those enumerated in the statute.

Par. 3639, under which appellant claims, is not as broad as section 1183 of the California statute for it does not provide for liens for "furnishing materials to be used or consumed in or furnishing appliances, teams or power contributing to the construction" etc., of any "ditch, flume, aqueduct," etc., but only provides for a lien for "any building, or other structure or improvement whatever". Section 1183 of the California statutes provides for a lien for miners, and for services performed and materials furnished to railroads, and upon ditches, flumes, aqueducts, etc., whereas such liens are not provided for in section 3639 of the Arizona statutes, such section only providing for a lien upon houses, building and structures; the lien upon a railroad being found in a different paragraph, namely, paragraphs 3651 and 3652 of R. S. of Arizona, 1913, Civil Code; the lien for miners is found in par. 3654 of said Code and the lien upon ditches, flumes, aqueducts, etc., is found in par. 3653 of said Code. It will be seen, therefore, that par. 3639 of the Arizona statu-

tes is very much more restricted than sec. 1183 of the California statutes, and the Mendoza case is not a construction of the word "structure" as used in par. 3639 of the Arizona statutes. In California a statement of all property and things upon which a mechanic's lien may attach is embraced within section 1183 of the Code of Civil Procedure while in Arizona liens upon different kinds of property are divided into various paragraphs. Paragraph 3653, relating specifically to ditches, flumes, aqueducts, reservoirs, etc., is, therefore, the section under which this lien must be asserted.

Appellant in his second amended complaint, in the third paragraph thereof (T. of R. 4) expressly says that certain horses and mules and certain machinery, fixtures and tools were furnished to be used in the construction of canals and water ditches and other works and structures as aforesaid, referring to flumes, culverts, gates, dams, wells, pumps and pumping plants, mentioned in the second paragraph thereof. Counsel for appellant expressly say that whatever was furnished was furnished in the construction, alteration or repair of canals and water ditches, etc., in accordance with the to say that section 3639 has any application to this language of paragraph 3653. How counsel can assume case is difficult for us to perceive.

It would be nothing but a repetiton to argue the matter further. Counsel for appellant seem to admit that the only way they can bind the appellees is to bring this case under section 3639 and it is sufficient to re-

fute this to read the second amended complaint of appellant and read the two paragraphs, to-wit, 3639 and 3653.

APPELLANT HAS NOT PERFORMED LABOR

It is very apparent that in the case at bar there can be no lien for labor performed, by virtue of the leasing of the stock and equipment.

Jones on Liens, (3rd Ed.) Sec. 1361, states the following:

> "But a contractor is not a laborer within the meaning of the statute giving persons liens who perform work and labor, the statute being intended to protect the *actual laborers*, and not applying to contractors or those who only superintend the labor of others."

Little Rock etc. R. Co. v. Spencer, 65 Ark. 183, 194, 47 S. W. 196, 42 L. R. A. 334, was a suit to foreclose a mechanic's lien. The court said in part:

> "A contractor who does not perform any work or labor personally does not come within Sandels & H. Dig. Ark. Sec. 6521, providing a lien for 'every mechanic, builder, lumberman, artisan, workman, laborer, or other person or persons that shall do or perform any work or labor' on a railroad."

In the case of *Wood, Curtis & Co., v. El Dorado Lumber Co. et al.,* 94 Pac., pages 877-878, on page 878, it is stated that the action was brought and the lien claimed under the provisions of Sec. 1183, Code of Civil Procedure of California. This case was decided by the Supreme Court of California on March 13, 1908, and rehearing was denied April 10, 1908. Appellant cites this case and states, on page 11 of his brief, that

> "Under the California statute as it then existed, no lien was given for the furnishing of machinery, fixtures, or tools' to be used in the construction, etc., of any improvement or structure, and the lien was therefore denied."

Appellant, in his brief, at the bottom of page 11, says:

> "From the language of the opinion above quoted, it is quite evident that had the California statute under consideration given a lien for 'machinery, fixtures or tools,' as does the Arizona statute under which plaintiff claims his lien, the Court would have held that the plaintiff in the Wood, Curtis & Company v. El Dorado Lumber Co. case was entitled to a lien upon the railroad for the reasonable value for use of horses and harness furnished the contractor to be used in its construction."

The California statute as it then existed, did, however, give a lien for the furnishing of materials to be

used in the construction, etc., of improvements, etc. Section 1183 of the Code of Civil Procedure of California, as it at that time existed, is as follows:

> "Mechanics, material men, contractors, subcontractors, artisans, architects, machinists, builders, miners, and all persons and laborers of every class performing labor upon or furnishing materials to be used in the construction, alteration, addition to, or repair, either in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, wagon road, or other structure, shall have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done and materials furnished, whether at the instance of the owner, or of any other person acting by his authority or under him, as contractor or otherwise."

In the case above cited the Supreme Court of California said in part:

> "On February 17, 1904, the defendant and appellant herein, the El Dorado Lumber Company, enterd into a contract with the defendants Carney, Roy & Carney for the construction of a single-track railroad, upon a private right of way from North Placerville to its storage yards in El Dorado county. Thereafter, and during the progress of

construction work upon said right of way, the plaintiff corporation let to the firm of Carney, Roy & Carney 53 head of horses, with their harness, at the rate of $10 per month for each horse and harness. An examination of the record shows that these horses were used by Messrs. Carney, Roy & Carney in the course of the construction work, and that the drivers of the horses were hired and paid for by them. * * *

The question, then, which the trial court answered in favor of plaintiff, is: Did plaintiff, by this letting of its horses at a stipulated price per month, 'bestow labor' upon the work, so as to entitle it to a lien under Sec. 1183, Code of Civil Procedure? * * *

The horses ,as horses, were no more entitled to liens than were the harnesses themselves. Each and both together were but convnient appliances for the doing of specific work. In the ultimate analysis there is no difference in principle whether draying is done by horses and wagons, or by automobile trucks; whether grading is done by horses and scrapers or by traction engines and steam peddies. One and all are, in their essence, but tools and machinery. This being so, if the ruling for which respondent contends is the correct one, it must result that if A leases to B a derrick or hoist for use upon the buildings which B is constructing, A will have a lien upon each of those

buildings for the value of the use of the derrick: or, in still simpler form, if a carpenter lets to a fellow carpenter his chest of tools for 50 cents a day, the former will have a lien upon every building upon which the latter works and uses the rented tools. The illustration, reduced to its simplicity, shows the untenableness, if not the absurdity, of the contention. Giving to the law its broadest and most beneficent construction, it can never be said that one who merely rents appliances to another who labors upon a structure has himself bestowed labor upon that structure within the meaning of the law."

This case was decided upon a statute substantially the same as the Arizona statute and which statute gave a lien for both labor and the furnishing of materials. We submit that the ruling in the above quoted case applies equally as strongly to the case at bar.

One letting horses by the month to another to haul timber for a third person is not entitled to a lien upon the lumber for the rental thereof under a statute giving a lien for personal services and for services of a team, upon lumber, as, by such lease, the horses became the lessee's for the time being, and it was he who might have a lien for his services and the use of the horses, and not the owner thereof. *McCullin v. McMullin,* 92 Me. 336, 69 Am. St. Rep. 510, 42 Atl. 500; *Richardson v. Hoxie,* 90 Me. 227, 38 Atl. 142.

One letting horses for use in work of a lienable nature upon logs or lumber is not entitled to a lien for their hire, unless used and worked by him or his servants, under a statute giving a lien upon logs or lumber to any person performing services in cutting, manufacturing, or hauling the same. *Edwards v. H. B. Waite Lumber C.,* 108 Wis. 164, 81 Am. St. Rep. 884, 84 N. W. 150; *Mabie v. Sines,* 92 Mich. 545, 52 N. W. 1007.

One renting teams to a contractor for use in the construction of a railway is not entitled to a lien thereon for their hire, under a statute giving a lien to those performing labor with tools or teams in the construction of a railway, such claim not being within the scope of the statute. *Eastern Texas R. Co. v. Foley,* 30 Tex. Civ. App. 129, 69 S. W. 1030.

Nor is one employed as a superintendent in the construction of a railroad, who furnishes tools and teams for use thereon, entitled to a lien upon the railway for the rental thereof, under a statute giving a lien to mechanics and laborers for labor performed, nothwithstanding the claimant did, at times, use the tools himself, and at other times directed their use by the laborers, as the right to a lien, under the statute, does not extend to work and labor done by others, nor to the use of teams, tools, or implements other than such as are personally used by the claimant. *Texas & St. L. R. Co. v. Allen,* 1 Tex. App. Civ. Cas. (White & W.) 291.

In *Mabie v. Sines,* 92 Mich. 525, 52 N. W. 1007, the court said:

"To hold that the owner of a team let for a stated time, at a stipulated price, may recover even though the one who contracts to and does the work is fully paid, would, we think, be to extend the provisions of the statute beyond their terms or purpose, and would of necessity involve holding that the owner of any machinery or tool leased to the contractor or laborer is entitled to a lien, irrespective of the state of accounts between the owner and such contractor, or between the contractor and the laborer."

In principle, this case is identical with the case at bar.

In the case of *McKinnon v. Red River Lumber Company,* 119 Minn. 479, 138 N. W. 781, 42 L. R. A. (N. S.) 872, decided by the Supreme Court of Minnesota on December 6, 1912, the court said:

"Plaintiffs entered into a written contract with Sibley, by the terms of which they hired and let him have twelve teams of horses at the agreed price of $26 per month for each team. These teams worked for Sibley in hauling and banking the logs he was under contract to haul and bank for defendant. LaPalm, one of the plaintiffs, worked for Sibley in caring for the horses, and drove one of the teams on the work. He was to receive $40 per month for his services, which was paid by defendant. The contractor, Sibley, became insolvent. Plaintiffs, after dmanding payment for

the services of their horses, both of Sibley and of the defendant, filed a lien on the logs for such services. The lien statement, as well as the evidence, shows that the amount claimed was only for the labor of the horses at the contract price, and did not include anything for the personal services of Lapalm, which had been paid for. * * *

The owner of horses, machinery or tools, who leases his equipment to a contractor, certainly does not 'perform manual labor or other personal services for hire' in aid of the cutting, hauling or banking of logs, which the contractor by himself and his servants does under his contract. The contractor has a lien for his own and his employees' labor, and for the use of all instrumentalities, including teams, which are actually used in and necessary to the performance of such labor by the contractor and his employees. Sibley, doubtless, would have a lien upon the logs for his own and his employees' services, including the services of the teams with which they worked. This is the rule of Martin v. Wakefield and Breault v. Archambault, and is also the rule in Wisconsin, Michigan and Maine. But we must hold that the owner of teams or instrumentalities, who leases or hires them to a lumberman or a logger, and who does not, by himself or by his servants, perform manual labor or other services, is not entitled to lien on logs."

In the case of *Lohman v. Peterson et al.*, 87 Wis. 227,

58 N. W. 407, decided by the Supreme Court of Wisconsin, the plaintiff showed, in substance, that he had hired an ox to one Gundersgord for an agreed price; that Gundersgord had a job of hauling railroad ties for the defendants and used the ox in hauling and skidding the ties, and claimed a lien under the statute for the agreed price. The court said:

> "The statute on which the action is founded is Chapter 139, Laws 1891. So much as is involved in the decision is as follows: 'Section 1. Any person who shall do or perform any labor or services in cutting, hauling * * * any logs or timber * * * shall have a lien upon such logs, timber, lumber, cordwood, railroad ties * * * for the amount due or to become due for such labor or services.'
>
> "The evident object of this statute is to secure to such persons as do manual labor upon logs or timber, their pay for their labor. The terms of the statute are, 'Any person who shall do * * * labor or services' shall have a lien. A similar statute has been construed to include, not merely the personal and manual labor of the claimant himself, but also that of his servants, with his teams, Hogan v. Cushing, 49 Wis. 169, 5 N. W. 490. What a man does by another, for many purposes he is said to do by himself. In this case the plaintiff did no manual labor for the defendants,

either personally or by his servant. *It seems like straining the meaning of words to say that he did or performed labor by his ox.* The ox was hired to Gundersgord. It was used by him. For that service it was Gundersgord's team. He had a right to a lien upon the same ties for his services, including the services of that team. Kelley v. Kelley, 77 Me. 135. It was hired to him with no reference to this particular work, but generally. Its time was hired at an agreed price per day, for all the time it was kept by Gundersgord, whether it worked or not. The evidence does not show how much work the plaintiff's ox did on defendants' ties. The claim is not made with reference to that fact, but with reference to the time it was absent from the plaintiff's home. It is held that the plaintiff's evidence failed to show that the plaintiff had done or performed labor or services on the defendant's railroad ties, within the meaning of the statute."

The case of *Hogan v. O'Neill et al.*, 5 N. W. 494-495, cited by appellant on page 12 of his brief, merely holds that the lien claimant had a lien for his servants and teams. The labor of the teams was accompanied by the manual labor of the servants, which makes that case entirely different from the case now before the court.

Appellant, on page 13 of his brief, cited the case of *Chicago & N. E. R. v. Sturgis*, 7 N. W. 213, and stated

> "it was held that the owner of horses was entitled to a lien for the reasonable value of services performed by them under contract of hiring."

An examination of this case discloses the fact that the plaintiff also labored, as well as his horses. The rule seems to be well settled that where a claimant himself labors he is entitled to include the value of services performed by his servants and his teams. This is such a case. In this case the court said:

> "The 'protection' provided for is confined to 'laborers for and persons furnishing materials to contractors or sub-contractors.' A distinction is clearly marked between those who contract for labor and materials and the persons who actually perform labor and actually furnish materials."

As the appellant in the case at bar merely contracted to furnish stock and equipment to another person, who, in turn, could use them, and the appellant and his servants or agents did not perform any labor in connection therewith, it seems clear that, under the above rule, he would not be entitled to a lien.

And in the next case cited by appellant, that of *Perry et al. v. Murphy et al.,* 57 N. W. 792, we find the same situation exists. The lien claimant not only furnished teams, but performed manual labor through his servants. The cases cited by appellant are cases where manual labor was performed by the lien claimant or his

agents in connection with the labor of teams. In no case has a lien ever been allowed for the labor of teams alone, hired without drivers or teamsters. The cases cited by appellant and above referred to are all cases where the labor of the teams was accompanied by personal and manual labor of the lien claimant, his servants or agents, and, therefore, are entirely different from the case at bar, where the contract of leasing was of teams alone and no personal or manual labor was performed by the lien claimant or his agents or servants.

APPELLANT DID NOT FURNISH MATERIALS

There can be no lien for the plaintiff in this case for materials furnihed. The mere using of wagons, etc., that had been leased for no particular purpose, did not convert them into "material" for the construction of any canal, water ditch, etc.

The word "material," according to Webster, imports the substance of which anything is made. "Material" according to Bouv. Law Dictionary, "includes everything of which anything is made."

In the case of *McAuliffe v. Jorgenson et al.,* 82 N. W. 706, 707, 107 Wis 132, decided by the Supreme Court of Wisconsin, the facts were that the plaintiff endeavored to establish a lien upon certain land for the money due him for the use of well-boring machine hired by said plaintiff to the contractor. The lien was sought to

be established under sections of the Revised Statutes of Wisconsin (3314-3315) giving a lien for "work and labor" performed and "materials" furnished in constructing a well. The court said:

> "Plaintiff has no lien unless it is given him by virtue of sections 3314, 3315, Rev. St. 1898. The former section provides in substance, that every person who, as principal contractor, performs any work or labor or furnishes any material in digging or constructing any well shall have a lien upon the interest of the owner in the land upon which the same is situated, not exceeding one acre, if within the limits of a city. Section 3315 provides substantially that every person who, as subcontractor of the principal contractor, performs any work or labor, or furnishes any materials to the parties named in the preceding section, shall have the lien and remedy provided by that chapter, upon performing certain conditions, which it is admitted were performed in this case. Plaintiff's right to a lien is based upon the fact that he hired his well-boring machine to Jorgenson, who had the contract to bore the well. Laws giving liens to mechanics are equitable in their character, and are to be liberally construed to advance their objects; yet they are purely statutory and cannot be extended by construction to cases not fairly and reasonably within their purview. It will be observed that the statute speaks of 'work and labor' performed or

'material' furnished. Under no permissible theory can it be said that the plaintiff has furnished any 'materials' that entered into or became a component part of the well. Whatever right he has, if any, arises from the use of his machine. When he hired it to Jorgenson, to all intents and purposes it became the latter's machine, the same as if he had purchased it outright. The plaintiff did no manual labor, either by himself or his servants, toward the construction of the well. The machine was used by Jorgenson as though it was his own. For its use in connection with his labors he would have been entitled to a lien; not for the use of the machine alone, but because with his labors in the use and operation of the machine the well was drilled. The machine thus used is 'the plant of the contractor' and can in no sense be said to be materials furnished or used in the drilling of the well. Basshor v. Railroad Co., 65 Md. 99, 3 Atl. 285. To permit this lien to stand and be enforced would be stretching the lien law beyond any reasonable limit."

In the case of *Gilbert Hunt Co. v. Perry*, 110 Pac. 541, the Supreme Court of the State of Washington said (1910):

"This is an action to foreclose a lien claimed by the plaintiff upon the buildings, structures, ditches, etc., constituting the power and irrigation plant of

the Pasco Power & Water Company, and also upon several thousand acres of land of that company proposed to be irrigated by the plant. A trial before the court resulted in a judgment of foreclosure and an order for the sale of the property to satisfy the plaintiff's claim. The defendant has appealed.

"The Pasco Power & Water Company is a domestic corporation engaged in a general scheme and enterprise in the county of Walla Walla along the Snake river, having for its purpose the irrigation of several thousand acres of land, and the building of irrigation ditches and pumping plants, all as a part of one general scheme for the improvement of its land. Between February 5 and November 9, 1907, the appellant furnished to the Pasco Power & Water Company a large number of articles, expended money in paying freight and cartage thereon to the place of delivery, and performed other services in connection with the furnishing and delivery of the articles, all of which we will assume entered into the cost thereof. * * *

"These articles were all furnished and accepted for the purpose of being used by the Pasco Power & Water Company in connection with the construction of the buildings, structures, ditches, etc, upon its land. A careful reading of all the evidence convinces us, however, that these articles were not furnished with the understanding or intent that all

of them were to be used in the construction of the structures or ditches when completed; but that they were furnished with the understanding that they were to be used in connection with such construction, at least for the most part, only as tools and appliances to carry on such construction. The list of items so furnished, with the charge for each, shown by an exhibit in the record, admitted to be correct, covers many typewritten pages. There are, among others, such items as horse shoe nails, hammers, straps for steam shovel, blacksmith's coal, dump car trucks, rental for engine, curry combs, horse brushes, slides for donkey engine, truck axles, tar, draw heads and springs therefor, car wheels, lathe work on axles, blacksmith's work on axles, drills, putting on car wheels, brass part for steam shovel, cylinder oil, saw blades, saw set, tongs, wrenches, cup grease, files, powdered emery and emery cloth, boxes for dump cars, packing, oil can, brake shoes, and freight charges on such articles. It is quite plain from the record that these items, to which others might be added by closely scrutinizing the list, were not furnished to be used in, and were not used in, the buildings, structures, or ditches; but were furnished to be used and were used as tools and appliances or as repairs thereto, with which the work of constructing the plant was carried on. * * *

"The provisions of section 1129, Rem. & Bal.

Code, under which this claim of lien is made, so far as we need notice that section here, reads: 'Every person performing labor upon or furnishing material to be used in the construction, alteration, or repair of any * * * building * * * ditch * * * or any other structure * * * has a lien upon the same for the labor performed or the material furnished.' * * *

"In the case of Armore & Co. v. Western Construction Co., 36 Wash. 529, 538, 78 Pac. 1106, 1107, Judge Dunbar, for the court, said: 'Under the lien laws, generally, "material" is deemed to be something that goes into, and becomes a part of, the finished structure, such as lumber, nails, glass, hardware, and a thousand other things that might be mentioned, which are necessary to the complete creation of a building or structure.' And in Tsutakawa v. Kumamoto, 53 Wash. 231, 235, 101 Pac. 869, 871, the same view was expressed by Judge Chadwick, speaking for the court, as follows: 'The object of these statutes is to secure a lien to the laborer and materialman for that which goes into the finished structure.' Articles furnished for use merely as tools and appliances, in carrying on the work of construction, are not lienable. Vendome Turkish Bath Co. v. Schettler, 2 Wash. St. 457, 27 Pac. 76; Hall v. Cowen, 51 Wash. 295, 98 Pac. 670; Potter Mfg. Co. v. Myer & Co., 171 Ind. 513, 86 N. E. 837, 131 Am. St. Rep. 267; Rinzel v.

Stumpf, 116 Wis. 287, 93 N. W. 36; Allen v. Elwert, 29 Or. 428, 44 Pac. 823; Meistrell v. Reach, 56 Mo. App. 243; Basshor v. Baltimore & O. R. Co., 65 Md. 99, 3 Atl. 285; Bender-Moss on Mechanics' Liens and Building Contracts, Sec. 89; 27 Cyc. 38, 45."

This case was decided under a statute with the same provisions, substantially, as to water ditches, structures, etc., as the Arizona statutes contain, and is in point with the case at bar. We think it clear that appellant has merely furnished tools and appliances for carrying on the work of construction, and, therefore, has not brought himself within the provisions of the statutes giving liens in certain cases.

In the case of *Hall v. Cowen,* 97 Pac. 670, the Supreme Court of Washington, on Dec. 26, 1908, said:

"The defendant Cowen, as owner of certain lots in one of the additions to the city of Seattle, employed the defendants Wagner & Harney to clear, grade and fill in certain streets adjacent thereto. The contractor hired or rented five wheel scrapers from the plaintiffs to be used in and about the work of grading and filling in the streets. Thereafter the plaintiff filed a lien against the lots owned by the defendant Cowen for the sum of $112.50 for the rental and hire of the scrapers, and this action was instituted against the contractors and the

owner of the property to recover the amount of the lien claim against the contractors, and to foreclose the lien against the abutting property. * * * The lien was claimed under section 5902, Ballinger's Ann. Codes & St. (Pierce's Code, Sec. 6104), which reads as follows: 'Any person who, at the request of the owner of any real property, his agent, contractor, or sub-contractor, clears, grades, fills in or otherwise improves the same, or any street or road in front of or adjoining the same, has lien upon such real property for the labor performed, or the material furnished for such purposes.' It seems to us too plain to admit of extended argument or discussion that a claim for the rental of scrapers is neither for labor performed or materials furnished within the purview of this section. Allen v. Elwert, 29 Or. 443, 44 Pac. 823, 48 Pac. 54; McCormick v. Los Angeles W. Co., 40 Cal. 185."

In the case of *Troy Public Works Company v. The City of Yonkers et al.,* decided by the New York Court of Appeals, 1912, the court said:

"This is an action brought to foreclose a mechanic's lien. The only question to be decided is whether the plaintiff is entitled to a lien for the rent of a steam shovel which it leased to a contractor. * * * The steam shovel in the case at bar did not go into the work as material. It was a machine used on the work, not by the owner, but

by his lessee, and it was returned to the owner just as it was received, necessary wear and tear excepted. It was not material, either according to the definition of the lexicographers, or under the decisions in other states where they have lien statutes similar to our own. Material means 'matter which is intended to be used in the creation of a mechanical structure' (2 Bouvier's Law Dict. Rawle's Rev. 341), or 'the substance matter of which anything is made' (Webster). It does not mean the machinery that may be used in the manufacture of materials, for it might as well be said 'that the mill by which lumber is sawed, or the tools used by the mechanic in building a house, are materials furnished in the construction * * * as to say that the machinery used in the manufacture of the artificial stone is to be considered as part of the materials used in the construction of the masonry work.' Basshor v. Baltimore & O. R. Co., 65 Md. 103, 3 Atl. 286. A similar view was expressed in a case where the wooden molds for concrete blocks were returned to the owner after the completion of the work. These were characterized as instrumentalities 'used in shaping the concrete of which the interior walls of the building were constructed, and no more entered into the actual construction of the building than did derricks, tackle, engines or any other mechanical appliance which may have been used in its construction, and, after the completion

> of the building, removed as the property of the contractor owning and operating them.' Builders' Material Co. v. Johnson, 158 Ill. App. 411. The same result has been reached by the courts of other states where lien laws have been filed for labor, instead of materials, by lessors of machines who themselves contributed no labor to the structures upon which the machines were used."

We think the above case is in point with the case at bar and completely answers the claim and argument of appellant that he is entitled to a lien, in the negative.

In Indiana, under a statute which gave a right to a lien for the use of machinery in the erection of structures, the lessor filed a lien for the use of a "trench machine" which was operated exclusively by the lessee and his employees. The Supreme Court of Indiana, in speaking of the lienor's claim, said that it was

> "not for the value of the work actually done, but compensation at an agreed price for a specified time as the rental value of the machine, without regard to whether it was idle or in use upon this work,"

and held that the lessor was not entitled to a lien. *Potter Mfg. Co. v. Myer*, 171 Ind. 517, 131 Am. St. Rep. 267, 86 N. E. 838.

Neither is one entitled to a lien for the rental of horses for such purpose, under a statute giving a lien to one who shall 'furnish any materials, machinery, fix-

tures, or any other things toward the building, construction or equipment of any railroad,' the hire of teams not falling within the terms of such statute. *St. Louis, I. M. & S. R. Co. v. Love,* 74 Ark. 528, 86 S. W. 395.

APPELLANT IS NOT ENTITLED TO LIEN UNDER EITHER OF THE STATUTES IN QUESTION

Appellant is not entitled to a lien under par. 3653 or 3639 for the reason that the mules and equipment were not furnished to the owners of the lands, canals, water-ditches, etc., upon which a lien is sought to be established, but were furnished to Edwin R. Post, acting in his individual capacity.

Judge Dooling, the trial judge, had cited to him, at the argument of the motions to dismiss, paragraphs 3653-3639, and appellant's second amended complaint. He sustained the motions to dismiss the second amended complaint because it did not state facts sufficient to constitute a cause of action, and made a statement in so doing that is more pat than our argument, in which he says that there is no averment as to who owned the property at the time the contract sued upon was entered into, that is to say, the contract sued upon by appellant, and that the contract makes no mention of where, or for what purpose, the property thus furnished was to be used. We quote from Judge Dooling's opinion and order sustaining motions to dismiss appellant's second amended complaint, as follows:

"Whatever may be the rule where horses and equipment are furnished by their owner directly to the owner of the property to be improved, it seems to be settled that where they are furnished by the owner to a third party, who in turn uses them in the improvement of the property of another, if there be any lien existing at all, such lien exists in favor of the third party, who stands in the place of the owner by reason of his contract of hiring. McMullin v. McMullin, 42 Atl. 500; Richardson v. Hoxie, 38 Atl. 142; Edwards v. Lumber Co., 84 N. W. 150; Mabie v. Sines, 52 N. W. 1007; McKinnon v. Lumber Co., 138 N. W. 781; Lohman v. Peterson, 58 N. W. 407; McAuliffe v. Jorgenson, 82 N. W. 706, and Potter Co. v. Myer, 86 N. E. 838." (T. of R. 22.)

Jones on Liens (3rd Ed.), Sec. 1235, page 424, says:

"A contract, express or implied, of the owner of this land is necessary to the establishment of a mechanics' lien upon it. The lien, however, is created, not by the contract, but by furnishing the materials or doing the work under the contract. Yet a contract creating an indebtedness on the part of the person whose property is to be charged with a lien must exist in the first place, and then the performing of labor or the furnishing of materials under the contract creates the lien."

In this case the contract itself shows that appellant

contracted with Edwin R. Post, and not with the owners of the land, the lease reading as follows:

> "THIS AGREEMENT, made and entered into this 16th day of October, 1919, by and between T. M. Caldwell, of Phoenix, Arizona, as party of the first part, and E. R. POST, of Tucson, Arizona, as party of the second part" (T. of R. p. 5),

and is signed as follows:

> "T. M. CALDWELL
> EDWIN POST." (T. of R. p. 9.)

The supplemental contract reads as follows:

> "THIS AGREEMENT, made and entered into this first day of April, 1920, by and between T. M. Caldwell, of Phoenix, Arizona, as party of the first part, and Edwin R. Post, of Tucson, Arizona, as party of the second part" T. of R. p. 10),

and is signed as follows:

> "T. M. CALDWELL
> EDWIN R. POST" (T. of R. p. 11).

Ruling Case Law, Vol. 18, page 894, after declaring that it is essential that a contract be made, states:

> "Such contract need not be in writing, but it must be made with the owner or his duly authorized agent, though this does not mean necessarily the owner of the fee, but one whose interest or

> estate in the property to be charged is such that a lien may attach to it."

Any lien that appellant might have would, therefore, only attach to any possible interest that Edwin R. Post might have in the land upon which a lien is sought to be established.

In the case of *Breman v. Foreman,* 1 Ariz., 413, Foreman and Jackson were at the time in possession of land under agreement for a deed thereto from J. Collingwood & Co., the absolute owners of the same, and material was furnished to said Foreman and Jackson. Foreman and Jackson failed to comply with the terms of the agreement for a deed, never became the owners of the land, and went out of possession of the property. The lower court decreed a sale of the whole premises under a suit for foreclosure of a mechanic's lien for the furnishing of the material aforesaid. The Supreme Court of Arizona, on appeal, held that only the *interest of the party who caused the building to be erected or the materials furnishd* can be ordered sold for the extinguishment of the lien.

Jones on Liens (3rd Ed.) Sec. 1247, says:

> "One in possession of land under a verbal or written contract to purchase cannot subject to a mechanic's lien either the building or the land, to prejudice of the legal owner, without his consent, even under a statute which contemplates a remedy

either against the building or the land. The lien of the mechanic or material man in such case must be measured by the extent of the equity of the purchaser under the executory contract. * * *

* * * Though no purchase is ever made by the contractor, and the premises with the improvements revert to the owner, the latter is not, by his acceptance, use and enjoyment of the improvements, estopped to deny that he made or authorized the contract for placing them upon his land."

Sec. 1248. "One having merely a contract for the purchase of land cannot subject the freehold to a mechanic's lien, although he subsequently, after the completion of the work for which a lien is claimed, takes a conveyance of the fee in pursuance of the contract. To create a valid lien, the person whose agreement or consent is necessary for that purpose must, at the time of such agreement or consent, have the capacity to confer that right."

Sec. 1253. "In general, it may be said that the owner's consent cannot be implied from his knowledge that improvements are in process of construction which would give rise to a lien if they were made with his authority or consent. Knowledge on the part of the owner that another, without authority, has made a contract for the erection of a building, and that under such contract the building is approaching completion, is not sufficient to

bind the owner or his property. Thus, if a husband, on his own responsibility, contracts for the building of a house upon his wife's estate, her mere silence or failure to dissent from the contract does not make the contract binding upon her.

"Mere knowledge of the owner that a laborer is working upon the building does not amount to a consent which entitles the laborer to a lien. Consent within the meaning of the statute is held to mean something more than acquiescence. It implies an agreement to that which could not exist without such consent."

In Boisot on Mechanics' Liens, at Section 124, the following appears:

"In making improvements on land, a mechanic or material man must take notice of the interest and title in the premises of the person with whom he contracts, as shown by public record, as his lien, as a general rule, attaches only to such interest."

We think this case comes fairly within the rule laid down by the trial judge, namely, that no lien can be acquired where horses and equipment are not furnished by their owner to the owner of the property to be improved, but are furnished by the owner to a third person, who in turn uses them to improve the property of another. These horses and equipment were furnished to Post, who in turn used them on the property of the

defendants. The right to a lien, if any there be, would exist in favor of the person or contractor doing the work, and the appellant is not entitled to a lien on the property of the defendants, for any unpaid balance due him from Post. This is true, regardless of the paragraph of the Arizona statutes under which the lien is claimed. Even though par. 3639 applies to this claim of lien, as contended by counsel for appellant, appellant is not entitled to a lien, as he did not furnish the horses and equipment to the owners of the property to be improved, as appears from the facts set forth in the complaint, notwithstanding appellant's conclusion that the same were furnished to the owners.

MULES AND EQUIPMENT WERE NOT FURNISHED BY APPELLANT FOR THE PARTICULAR PURPOSE NAMED IN THE STATUTE

In order to acquire a mechanic's lien on property, it is necessary that the party performing labor or furnishing maetrials must contract with reference to the particular property upon which he later seeks to establish a lien. It is not sufficient to show that the mules and equipment furnished to Post were used in the construction of canals, water-ditches, etc., on the land of the defendants, it must be alleged and proved that the mules and equipment were furnished, by the express terms of the contract, to be used for the particular purpose of construction, alteration or repair of any canal, water-ditch, etc., upon the land of the defendants and were in fact so used.

The contract in this case is a lease dated October 16, 1919, which does not in any way state the purpose or use to which the leased animals and equipments were to be put. The lease did not state any specified time during which the stock was to be available to the party of the second part, and, accordingly, on the first day of April, 1920, a further and supplemental agreement was entered into by the same parties, which recited,

> "WHEREAS, the agreement above referred to did not state any specified time during which this stock shall be available for use by party of the second part and whereas the party of the second part desires to continue the use of this stock until the first of June, 1920, and for a longer period provided party of the second part has other work which it is desired to use this stock for."
>
> (T. of R. p. 10.) * * *
>
> "First: That the party of the first part will rent to the party of the second part, under the same terms and conditions as are embodied in the agreement of October 16, 1919, the stock and equipment now in the possession of the party of the second part until the first of June, and for such longer period as may be necessary to complete the construction work remaining to be done on that portion of the Santa Cruz Valley Farms project lying south and east of the syphon crossing of the Santa

Cruz River, a short distance from Rillito."

(T. of R. p. 10.)

This supplemental agreement was merely to provide a time for the termination of the lease and did not impose upon the party of the second part the duty of using the stock and equipment in any particular place or for any particular purpose.

Had the party of the second part used the stock and equipment leased to him in grading streets or filling in city lots, there is no clause in the contract which would enable the party of the first part to restrain him from so doing. The contract of leasing, on page 5 of T. of R. says:

> "1. That the said party of the first part does hereby let the use and deliver possession f. o. b. the cars at Phoenix, Maricopa County, Arizona, to the said party of the second part, and the said party of the second part does hereby hire the use and shall receive possession f. o. b. the cars at Phoenix aforesaid from the said party of the first part,"

and on page 7 of T. of R., in the fifth paragraph of the first lease, we find the following:

> "said party of the second part shall re-deliver said property to said party of the first part in as good condition as when delivered and received, and such

> re-delivery shall be made on cars at nearest shipping point by said party of the second part if said first party so requests."

The lease provides where the party of the second part shall receive the leased stock and equipment and where he shall return them and the supplemental agreement provides the time during which they shall be available to him, leaving him free to make such use of them while they are in his possession as he shall desire. In fact, the supplemental agreement expressly provides that he may make such use of the stock and equipment as he desires and shows that the parties to the lease had in contemplation, at the time the supplemental agreement was executed, the fact that the party of the second part would desire to use the stock and equipment for various kinds of work. The supplemental agreement states, at page 10 of the T. of R., the following:

> "and whereas the party of the second part desires to continue the use of this stock until the first of June, 1920, and for a longer period provided party of the second part has other work *which it is desired to use this stock for,*"

The phrase "which it is desired to use this stock for" leaves it to the discretion of the party of the second part as to what work he shall use the stock for.

There is nothing in said lease or the supplement thereof which provides for the

> "furnishing of the labor of certain horses and mules, and of certain machinery, fixtures and tools to be used in the construction of said canals and water ditches and other works and structures as aforesaid,"

as alleged in paragraph III of appellant's second amended complaint. (T. of R. p. 4.)

In no place in the lease or supplement thereof is there any reference to canals, water ditches, etc., nor is there any reference to any kind of work on which the property shall be used.

The first agreement was entered into on October 16, 1919, and the supplement agreement was entered into a long time thereafter, to-wit, on April 1st, 1920, and only a short time before the termination of the lease, on July 19, 1920 (T. of R. p. 12), and in no wise changed or affected the right of the party of the second part to use the stock and equipment leased, for any purpose that he so desired.

Under the leases hereinbefore referred to, there was nothing to prevent Edwin R. Post from using the horses, mules and equipment to build highway in Pima County or for any other purpose for which they were suited. The lease did not contemplate the use of such stock and equipment on the Post Project in the construction of ditches and canals. The fact that such horses, mules and material were used on the Post Project in the construction of canals, ditches, etc., did not

operate to give the lessors a lien on such canals, ditches, etc., as such use was not provided for in the lease. The plaintiff herein could not have restrained Edwin R. Post from using the leased stock and equipment in building highways, if Post had decided to use the stock and equipment for that purpose. In order to acquire a lien under the statute for labor performed or materials furnished for the construction, alteration or repair of any canal, water ditch, flume, etc., the party furnishing such material or performing such labor must furnish the material or perform the labor for the *special purpose named in the statute.*

Jones on Liens (3rd Ed.) sec. 1327, states:

> " * * * The allegation and the proof must be that the materials were *furnished to be used* and *were used* in the building upon the premises against which it is sought to enforce the lien. * * * It is the furnishing of the materials under a contract, with the *intention and understanding that it shall be used* in erecting the building that creates the lien."

In Cyclopedia of Law and Procedure, vol. 27, page 376, it is stated:

> "Plaintiff's pleading must show by proper allegations that the materials for which the lien is claimed were furnished to be used in the construc-

tion of the building upon which the lien is claimed, and it is not sufficient to state that such material actually entered into and became a part of the building."

Jones on Liens (3rd Ed.), sec. 1326, page 553, states:

"Materials must be furnished with special reference to their *use in a particular building* in order to secure the protection of a mechanic's lien law."

Ruling Case Law, vol. 18, page 992, sec. 52, states:

"The mechanics' lien law contemplates a contract or agreement more specific than an ordinary sale of materials. It should be understood between the parties that the materials are to be used in the erection or repair of a building or the making of an improvement. If a materialman sells his materials without any understanding as to their application, he can assert no lien upon the building upon which they may be used, as he relies exclusively upon the credit of the buyer and takes no security. The lien is acquired, therefore, only when the materials are furnished with an understanding that they are to be used for a purpose named in the statute, and not when they are supplied under an ordinary sale on credit, though the buyer may actually use them in a building or improvement."

In the case of *Choteau v. Thompson,* 2 Ohio, St. 114, 126, the court said:

> "If a material-man sells his wares with no understanding, express or implied, as to their application, he can assert no lien upon the building or vessel in which they may be placed. He trusts to the responsibility of the buyer alone and takes no security. He sells, *not for the special purpose named in the statute* of 'constructing, altering, or repairing' but for *any purpose that may seem best to the buyer.* But it is only where the materials are furnished for a purpose named in the act that a lien is acquired."

The reasoning in the case just cited applies just as forcibly to the case at bar, where the lease leaves the lessee free to use the stock and equipment for any purpose that he may desire. There is nothing in the lease by which the lessor could require the lessee to use the stock for any particular purpose, or by which he could prevent the lessee from using the stock and equipment for any purpose for which the property is suited.

In the case of *Burkhart et al. v. Reisig,* 24 Ill. 530, the court said:

> "No lot on which a lien could attach, is mentioned in the contract. There is no element of a lien disclosed in the case, and it is not, in any sense, within the statute."

"The mechanics' lien law provides, that any person who shall, by contract with the owner of any piece of land or town lot, furnish labor or materials for erecting or repairing any building, or the appurtenances of any building, on such land or lot, shall have a lien upon the whole tract of land or town lot, in the manner herein provided, for the amount due to him for such labor or materials.

(Scates' Comp. 156).

"* * * By the contract, the engine could be set up on any lot in Chicago. We understand the intention of the law is, that the contract must have reference to some *particular tract of land or town lot,* in order that the lien may take effect."

In the case of *Genest v. Las Vegas Masonic Bldg. Assn. et al,* 11 N. M. 251, 67 Pac. 743, it was held that where materials are *furnished to be used,* and *in fact are used,* in the construction of a particular building in New Mexico, the party so furnishing such material is entitled to the benefit of the lien laws of New Mexico, the court saying:

"It is the furnishing of materials *to be used in the construction* and the putting of them into the building which entitles the subcontractor to the lien upon the premises to the value of the material."

We also cite the following cases which hold that at

the time the contract is made the parties furnishing labor or materials must contract with reference to the particular property upon which a lien is later sought to be created. In this case it is apparent that the stock and equipment leased by appellant was not furnished for any particular purpose. The lease is in writing and speaks for itself.

"One is entitled to no lien on a lot and building for materials furnished the contractors before he knew that they were to be used in the building." Cook v. Rome Brick Co., 98 Ala. 409, 12 South. 918.

"When materials are sold under a general sale, without any reference to what use or when they are to be used, the seller is not entitled to a mechanic's lien therefor." Colorado Iron Works v. Riekenberg, 43 Pac. 681.

"In order to entitle a material man to a lien the material must be furnished for the house on which the lien is claimed." Current River Lumber Co. v. Cravens, 54 Mo. App. 216.

"To entitle a material man to enforce a lien upon a building for material furnished, it must not only be alleged and proved that the materials have been used in the construction of the building, but that they have been, *by the express terms of the contract,* furnished for the particular building on

which the lien is claimed." Haughton v. Blake, 5 Cal. 240.

"To entitle a material man to enforce a lien upon a building for material furnished, it must not only be alleged and proved that the materials have been used in the construction of the building, but that they have been, *by the express terms of the contract,* furnished to be used in the building." Holmes v. Richet, 56 Cal. 307, 38 A. Rep. 54.

"There is no lien in the case of lumber furnished on general account without reference to its use in any particular building." Hill v. Bishop, 25 Ill. 349, 79 Am. Dec. 333.

"To create a lien for materials against a building, the materials must be furnished for the particular building in which they were used, and on which the lien is claimed. Hill v. Braden, 54 Ind. 72; Hill v. Ryan, Id. 118; Talbott v. Goddard, 55 Ind. 496.

"To entitle a material man to a lien on a build ing for materials furnished, he must show that they were furnished for the particular building on which he seeks to obtain the lien." Hill v. Sloan, 59 Ind. 181.

"If work be done or materials furnished, *without a contract* that they shall be put to the *particular* use of erecting, altering, or repairing a craft

> or building, no lien can be asserted on the building or vessel in which they may be placed." Choteau v. Thompson, 2 Ohio St. 114.

Section 1183 of the Code of Civil Procedure of California, hereinafter set out, provides for lien for labor bestowed or materials furnished. In a suit to enforce a lien under that section, in the case of *Roebling Sons Co. v. Bear Valley Irrigation Co. et al.,* the Supreme Court of California said in part:

> "In order to enforce the lien of a material man against a building or structure, 'the materials must not only have been used in the construction of the building, but they must have been, by the *express terms of the contract,* furnished for the *particular building* on which the lien is claimed'. Bottomly v. Rector, 2 Cal. 92; Houghton v. Blake, 5 Cal. 240; Holmes v. Richet, 56 Cal. 307; Cohn v. Wright, 89 Cal. 86, 26 Pac. Rep. 643."

Clearly, there can be no assertion that the stock and equipment were furnished, by the agreement of October 16, 1919, for the particular purpose of the statute, namely, to be used in the construction, etc., of canals, water ditches, etc. The supplemental agreement was entered into on the 1st day of April, 1920, and the lease was terminated on the 19th day of July, 1920, (T. of R. p. 12), only three months and nineteen days after the supplemental agreement was made, and being made, as

stated therein, for the purpose of fixing the time during which the stock and equipment should be available to the party of the second part, did not change the original agreement in any way whatsoever.

APPELLANT HAS NOT COMPLIED WITH THAT PART OF CONTRACT RELATING TO PURCHASE OF LAND BY HIM

In our argument that the second amended complaint of appellant does not state facts sufficient to constitute a cause of action, we call your Honors' attention to the second paragraph of the lease of October 16, 1919, appearing on page 6 of the T. of R. It is as follows:

> "The party of the first part shall purchase of the party of the second part not less than forty (40) acres of the land comprising the enterprise of the party of the second part; such land being either that certain 50 acre tract known and described as ————————, and which has been heretofore examined and designated as preferable by the first party; or any other 40 acre tract in said project remaining unsold by October 20th, 1919, and which the party of the first part may select on or before October 20th, 1919, the price of the tract being $150.00 per acre, with good and perfect title and accompanied by the Valley Farms Water Co. contract in the form now used for water contracts for water for said project, and the regularly printed

forms of the party of the second part shall be used in the matter of the purchase, sale and conveyance of and the water respecting such land."

Appellant agreed to purchase from the party of the second part forty acres of land at $150.00 per acre, amounting to a total of $6,000.00. Appellant alleges that the reasonable and agreed rental value of the stock and equipment was the sum of $9,692.55; that there has been paid on said sum the sum of $4,341.50, leaving a balance due appellant of $5,351.05. (T. of R. p. 12.)

Appellant does not state that he has not purchased the forty acres of land at $150.00 an acre. A man is presumed to fulfill his lawful contracts, and as far as the record shows appellant has received his forty acres of land and is not entitled to any further sum. Appellant is bound by the lease and contract, and shows no right of action in his second amended complaint, as he does not show that he was prevented from purchasing the land by the party of the second part, if in fact he was so prevented. It was clearly the intention of the parties to the contract that the party of the first part should take land from the party of the second part as part of the agreed rental for the stock and equipment of the party of the first part. The contract must be construed as a whole, and although the agreement of the party of the first part to purchase the land is a separate covenant, the contract undoubtedly would not have been entered into had the party of the first part not agreed to take part of his rental for the stock and

equipment in land. Appellant must allege either performance on his part of his covenant to purchase the forty acres of land or a sufficient excuse for non-performance. This he has not done. Appellant is bound by the stipulation or covenant in the contract that he "shall purchase of the party of the second part not less than forty acres of land," at $150.00 an acre, amounting to $6,000.00 and is presumed to have done so. As appellant only claims a balance due of $5,351.05, and the purchase price of the land is $6,000.00, his second amended complaint does not show that he is entitled to any further sums of money. If plaintiff intends to rely on an excuse for not performing, whatever it may be, the particular facts and circumstances constituting such excuse should be averred. Appellant has neither alleged performance on his part of, or an excuse for not performing, the covenant to purchase forty acres of land at $150.00 an acre from the party of the second part, and we therefore insist that the second amended complaint of appellant does not state facts sufficient to constitute a cause of action.

SUITS ON SURETY BONDS NOT APPLICABLE TO THIS CASE

Counsel for appellant, beginning at the bottom of page 14 of their brief, quote at great length from the case of *Multnomah County v. United States Fidelity and Guaranty Co. et al.*, 180 Pac. 104-105.

The case is a suit upon a certain penal bond, exe-

cuted by the Pacific Bridge Company as principal and United States Fidelity & Guaranty Company, as surety, to Multnomah County.

The bond was given under the provisions of section 6266, Lord's Oregon Laws. This bond and statute are construed, as stated in the above entitled case, in an opinion written by Mr. Justice Bean, in the case of *Multnomah County v. United States Fidelity & Guaranty Co.*, 87 Or. 189, 170 Pac. 525, L. R. A. 1918C, 685.

In the last mentioned case the complaint stated that Multnomah County entered into a contract with the defendant Pacific Bridge Company for the improvement of a portion of Columbia River highway. The Pacific Bridge Company commenced the construction of the improvement, and during the course thereof entered into an agreement with T. A. Sweeney for the grading of the highway. In performing this work he used a caterpillar engine which he hired from L. H. McMahan, whom he promised to pay the sum of $10.00 per day for the use thereof. A balance of $420.00 was unpaid for the use and repair of the catterpillar engine.

The construction company filed a bond with the county in accordance with the contract and section 6266, L. O. L., with the defendant United States Fidelity & Guaranty Company as surety. After reciting the contract between Multnomah county and the Pacific Bridge Company, the bond provides:

"Now, therefore, if the said principal herein

* * * shall faithfully and truly observe and comply with the terms, conditions, and provisions of the said contract, in all respects, and shall well and truly and fully do and perform all and singular the covenants, conditions, guaranties, matters, and things by it agreed, covenanted, and undertaken to be performed under said contract, plans, and specifications, upon the terms proposed therein. * * * and shall indemnify and save harmless the county of Multnomah, * * * and shall promptly pay all laborers, mechanics, subcontractors, and materialmen, and all persons who shall supply such laborers, mechanics, or subcontractors, with materials, supplies, or provisions for carrying on such work, all just debts, dues, and demands incurred in the performance of such work, * * * then this obligation to be void; otherwise to remain in full force and effect."

The court said in part:

"The position taken by the defendants is that the payment for the use of the caterpillar engine is not provided for in the contract and bond under the terms of the statute. In the expression of the statute it is quite likely that the lawmakers, to a certain extent, had in contemplation the various lien statutes providing for liens on buildings and other property, both real and personal, for labor and materials. However, the enactment under considera-

tion has a different purport and broader meaning than the ordinary lien statutes; therefore the construction of the latter affords but little assistance in arriving at the intent of the former. The lien statutes have usually been strictly held to cover only what is incorporated into the building or property against which the lien is claimed. Take for instance our mechanic's lien statute (L. O. L. Sec. 7416) which provides in part that 'a person performing labor upon or furnishing material, or transporting or hauling any material of any kind to be used in the construction, alteration, or repair, either in whole or in part, of any building' shall have a lien upon the same. Such lien statutes obviously cover only what goes into the building or structure and adds to the value of the same. * * *

"In the present case the act and bond are susceptible of a more liberal construction than the lien statutes. Under the law and the plain language of the bond all indebtedness incurred for labor and material used in the prosecution of the work contracted to be performed is thereby protected. * * *

"According to the strict legal definition of the term 'labor and material' the use of the engine would not be embraced therein. 2 Words and Phrases, Second Series, p. 1321."

The ruling in this suit on contract and bond has no application to the case at bar. As shown by the re-

marks of Mr. Justice Bean in his opinion, it is susceptible of a more liberal construction than the lien statutes. Mr. Justice Bean states in substance that if the above suit were upon the lien statutes, no lien would be allowed.

The next and last case cited by appellant, on page 17 of his brief, is the case of *Dawson v. Northwestern Const. Co. et al.,* 163 N. W. 772-777. This is also a suit on a surety company bond and is, therefore, one of a different line of cases entirely from the mechanic's and materialmen's lien cases. We desire to quote from the case itself to show what the conditions of the bond sued on were and to show how much broader the bond is than the lien statutes of Arizona. The court said in part:

> "This brings us to a consideration of the merits of the respective claims, as to whether they are such as are entitled to the benefit of the bond. Under G. S. 1913, Sec. 8245, the bond is required to be given:
>
> > 'For the use of the obligee and of all persons doing work or furnishing skill, tools, machinery, or materials under, or for the purpose of, such contract, conditioned for the payment, as they become due, of all just claims for such work, tools, machinery, skill and materials, for the completion of the contract in accordance with its terms, for saving the obligee harmless from all

costs and charges that may accrue on account of the doing of the work specified.'

The bond by its terms was 'for the use of the county, and also for the use of all persons who may perform any work or labor, or furnish any skill or material in the execution of the contract', etc. The words 'tools' is not employed in this 'use' clause, but does appear in the condition of the bond, which is that the obligor shall pay, as they become due, 'all just claims for all work and labor performed and all skill, tools, and material furnished under or for the purpose of or in the execution of said contract,' etc. In view of the quoted language of the condition clause, it must be held that one furnishing 'tools' for the work is entitled to the benefit of the bond. Sepp v. McCann, 47 Minn 364, 50 N. W. 246.

The claims of Riegelsperger, Joseph Gibson Company, First National Bank of Deer River, Engstrom & Hosford, and Ord Company involve the question of whether one renting or furnishing to the original contractors horses for use in performing the contract may have the benefit of the bond. This question is by no means free from difficulty. McKinnon vs. Red River Lbr. Co., 119 Minn. 479, 138 N. W. 781, 42 L. R. A. (N. S.) 872, involved the question whether the labor of teams, hired without drivers, was 'manual labor or

other personal service' so as to come within the log lien law. The decision that there was no lien is not controlling in this case, as the statute and bond use language that is *much broader*,"

The case above quoted, in which the bond covered "skill", "tools" and "for saving the obligee harmless from all costs and charges that may accrue on account of the doing of the work specified" is entirely different from the Arizona lien statutes and can have no application whatsoever.

On July 18th, 1919, Hon. Samuel L. Pattee, Judge of the Superior Court of the State of Arizona, in and for the County of Pima, decided the case of United States Fidelity & Guaranty Company vs. T. J. Shea, et al. An appeal was never taken in this case to the Supreme Court of Arizona and it will not, therefore, be found in the reports, but it is such an important case that I desire to briefly quote from Judge Pattee's opinion.

The defendant Shea entered into a written contract with the superintendent of streets of the City of Tucson for the construction of a sewer in said city. This contract was made under the provisions of what is known as the Improvement Act of 1912, being Chapter XIII, of Title 7, Revised Statutes of Arizona, 1913, and amendments thereto.

"At the time of entering into this contract Shea

gave the bonds, one in the sum of $18,405, conditioned for the faithful performance of the contract and the other in the sum of $36,810 conditioned as follows: 'Now, therefore, if the said contractor (Shea) or any of its assigns fail to pay for any material furnished for the said improvement or for any work or labor done thereon of any kind, the said surety will pay the same to an amount not exceeding the sum hereinabove specified. This bond shall inure to the benefit of any and all persons, companies or corporations who perform labor on or furnish materials to be used in the said work or improvement as provided in the Improvement Act of 1912 and subsequent amendments.' These bonds ran to the City of Tucson as obligee and were given in accordance with Paragraph 1962, Revised Statutes, 1913. * * *

Suit was brought on the surety bond and McLean & Walsh, among others, filed a claim against the surety company on the bond given. Their claim was for a trench digging machine furnished Shea for use in digging the sewer. In this connection Judge Pattee said in part:

"The case comes therefore to the question whether the rental of the trenching machine, including the freight charge in that term, is allowable in what is in effect a suit upon the bond. In other words, is such a charge one for labor or materials

furnished within the meaning of the statute and bond? The evidence shows that the machine was actually used in the digging of trenches in which to lay the sewer under the Northside contract. The work done by it was an essential part of the work to be done by Shea under that contract. This question has been presented to the courts in a number of cases and has resulted in a variety of absolutely conflicting decisions, sometimes based upon the peculiar language of particular statutes and sometimes taking a diametrically opposite view as to the meaning of identical language used in statutes. The best considered and, so far as the court is advised, the latest decision against the right to recover such a claim is Southern Surety Company vs. Municipal Excavating Company, 160 Pac. 617, a decision of the Supreme Court of Oklahoma. The claim in that case, like this, was for the rental of trenching machines. The condition of the bond in that case, as in this, was for the payment of labor and material furnished. The court reviews and comments upon a large number of authorities and reaches the conclusion that the rental of such a machine is not labor or material within the meaning of the bond. This case was decided in July, 1916, and perhaps at that time the preponderance of authority was with the view taken by the court. Later cases in other states, however, present a different view of the question. In the earlier cases

the tendency of the courts was to apply the rules obtaining in mechanics lien cases. It has always been the settled rule that public property is not subject to a lien on behalf of one furnishing labor or material, and the origin of statutory provisions providing for the giving of the bond to secure the payment of the claims of those furnishing labor or material may have been the necessity for making some provision to fill the office usually performed with respect to private property by a statute giving a mechanics' or materialman's lien. And this thought permeates apparently many of the decisions and furnishes the reason for the particular holdings made by many courts. So, treating the statute as in effect a substitute for the mechanic's lien privilege, the courts were prone to apply the same rules with respect to lienable and nonlienable material and what constituted labor or material as in cases arising under mechanic's lien statutes. The later decisions, however, have treated the right created by statute requiring the giving of a bond and the rights of action upon the bond as being something entirely different and independent of any statute relating to mechanic's liens, and have given such statutes and the terms used in them, such as 'labor', 'material' or 'supplies', a *much more broad and liberal meaning than would be given to like statutes relating to mechanic's liens.*"

The above case shows the difference between the

lien statute cases and surety bond cases.

In *Sherman vs. American Surety Co.,* 173 Pac. 161, a decision of the Supreme Court of California, the bond was conditioned for the payment of materials and supplies. It was held that a charge for rental and transportation of tools were materials or supplies within the conditions of the bond. In this case the distinction is stated between statutes giving mechanic's liens and statutes requiring the giving of bonds and the reasons for a more liberal construction of the latter are explained at some length.

The cases allowing recoveries on surety bonds for public works are an entirely different line of cases from the mechanic's and materialmen's lien cases and have, therefore, no application to the case at bar.

IF ONLY PART OF THE CLAIM IS LIENABLE THE ENTIRE CLAIM SHOULD BE DISALLOWED

If the court should decide that some of the articles are covered by the lien of the statute and some are not, and the court is unable to determine with certainty what are and what are not lienable items, the entire claim should be disallowed. In the case of *Gilbert Hunt Company v. Parry,* 110 Pac. 541, hereinbefore cited, the court said in part:

> "It may be conceded that where some single non-lienable item or even several are mistakenly in-

cluded in a claim of lien, and such items can be readily segregated from those which are lienable, that such fact will not necessarily destroy claimant's right of lien; but when the commingling occurs in such manner that the court is unable to determine with certainty what are and what are not lienable items in the claim made, then the rule seems to be that the entire claim of lien is of no effect. It does not appear to us that this case presents situation where there can be a segregation and preserve respondent's lien right, like in the case of Bellingham v. Linck, 53 Wash. 208, 101 Pac. 843, and cases there cited. The general rule is stated in Bender-Moss on Mechanics' Liens and Building Contracts, sec. 377, as follows: 'When an unspecified and undeterminable portion of the materials mentioned in the claim consists of non-lienable items which cannot be segregated from the general aggregate the claim is of no effect.' "

The cases cited by appellant have been cases where the labor of teams was coupled with manual labor of the claimant or his servants, or a suit upon a surety bond. The cases cited are, therefore, entirely different from the case at bar and the reasoning in such cases has no bearing upon the question of whether or not a lien exists in this case.

We think the cases we have cited show conclusively that no lien exists in this case. It is obvious that the

relation of lessor and lessee is the only one that existed between the owner and the user of the stock and equipment leased. No contract was made by the owner of the land with appellant; no labor was performed by appellant or his agents or servants in connection with the use of the stock and equipment leased; the stock and equipment was not furnished by appellant for the purpose of being used upon the particular land upon which a lien is claimed; the stock and equipment furnished under the lease did not go into the finished structure but were merely furnished for use as tools and appliances for use in carrying on construction work, and the furnishing of stock and equipment for carrying on construction work is neither performing labor or furnishing material within the meaning of the lien statutes of Arizona. Clearly, the appellant herein has not brought himself within the provisions of the lien statutes of Arizona, giving and granting liens in certain cases.

We respectfully urge that the action of the District Court in sustaining the motions of the defendants to dismiss the second amended complaint be affirmed.

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